BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 134.

JOHN THOMAS CARTER and EUGENE PEARSON MACKEMIE,
Appellants,

v.

THE COMMONWEALTH OF VIRGINIA,
Appellee.

BRIEF OF APPELLANTS.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

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BRIEF OF APPELLANTS.

To the Honorable, the Chief Justice of the United States and the Justices of the Supreme Court of the United States:

The Appellants submit this, their brief, in support of their appeal heretofore granted by this Court.

1.

This is an appeal from a final judgment and decree of the Supreme Court of Appeals of Virginia, rendered on March 8, 1943. The opinion of that Court in this cause is found in the official reports thereof in 181 Va. 306, and the same is also reported in 24 S. E. (2) 569.

2.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked upon the ground that the Supreme Court of Appeals of Virginia has sustained a statute and certain regulations promulgated by the Virginia Alcoholic Beverage Control Board pursuant thereto against the contention that the statute and regulations are repugnant to and in conflict with Article 1, Section 8, Clause 3 of the Constitution of the United States.

3.

STATEMENT OF THE CASE.

Appellants were apprehended and arrested in Virginia while operating a truck owned by one Healton Miller, of Winston-Salem, North Carolina. The truck contained a shipment of whiskey which had originated in Maryland and was destined and consigned to a person in North Carolina. None of the whiskey was intended to be diverted into any channels in Virginia. When arrested the Appellants exhibited to the officers a bill of lading containing the name of a lawful consignor, but the consignee, under the laws of North Carolina, was not authorized to receive the shipment. The bill of lading contained no designation of the route to be traveled by the truck while passing through Virginia. Healton Miller, the owner of the truck, had previously complied with one of the regulations in question (Regulations of Virginia Alcoholic Beverage Control Board, Section 42) by posting the required bond with approved surety, but prior to the time of the arrest the Virginia Alcoholic Beverage Control Board had cancelled the bond upon "information" that Healton Miller had the reputation of being a bootlegger in North Carolina, without any evidence of any violation of the laws of Virginia.

The warrant issued against Appellants charged them with violating Section 49a of the Alcoholic Beverage Control Act of Virginia and Sections 42 and 44 of the Regulations of the Virginia Alcoholic Beverage Control Board promulgated pursuant to the provisions of said statute, in that: (1) they had failed to post the required bond; (2) the bill of lading did not specify the route to be traveled through Virginia; and, (3) the consignee named on the bill of lading had no legal right to receive the shipment. (See "Criminal Warrant" R. 25, 26).

Appellants were tried and found guilty by the Trial Justice of Rappahannock County, Virginia, who imposed fines of fifty dollars and costs upon each of the Appellants (R. 26).

Appellants duly perfected their appeal from the judgment of the Trial Justice to the Circuit Court of Rappahannock County (R. 27).

The case was tried in the Circuit Court upon an agreed stipulation of facts (R. 33-36). The constitutional questions involved here were duly raised upon a motion to strike out the evidence and dismiss the warrant (R. 36-37), and, after judgment, upon a motion for a new trial (R. 37). The Circuit Court overruled said motions and entered final judgment of conviction, imposing fines of fifty dollars and costs on each of the Appellants (R. 31-32).

An appeal to the Supreme Court of Appeals of Virginia was duly perfected and on March 8, 1943, an opinion and final judgment were rendered, affirming the judgment of the Circuit Court (R. 38-42).

An appeal from the judgment of the Supreme Court of Appeals of Virginia to this Court has been perfected, and on October 11, 1943, this Court ordered that the further consideration of the question of jurisdiction was postponed to the hearing on the merits (R. 53).

4.

ASSIGNED ERRORS WHICH ARE INTENDED TO BE URGED.

Appellants intend to urge Assignments of Error Nos. 2, 3, 4, 5, 6 and 7, as set forth in their Assignment of Errors (R. 46-49). In the belief that a more logical and concise sequence may be thus presented, in our argument we have divided the questions to be decided into four main topics, numbered I, II, III and IV. For this purpose we have treated Assignment of Error No. 2 under Topic No. 1; we have combined Assignments of Error Nos. 4 and 5, under Topic No. II; we have treated Assignment of Error No. 3 under Topic No. III; we have treated Assignment of Error No. 6 under Topic No. IV; and have treated Assignment of Error No. 7 under each of the several Topics as it relates thereto.

5.

ARGUMENT.

The challenged statute and regulations promulgated pursuant to the authority thereof are as follows:

Section 49-a of Alcoholic Beverage Control Act of 1936 Michie's Va. Code of 1942, Sec. 4675 (49a).

> "Section 4675 (49a). *Transportation; transportation permits; penalties.*—The transportation of alcoholic beverages, other than wine and beer, purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia, in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act within, into or through Virginia in quantities in excess of one gallon, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic beverages other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675 (62). (1936, p. 434.)"

Regulations of Alcoholic Beverage Control Board, Section 42 (Order No. A-1, Aug. 30, 1940).

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act, as Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alco-

holic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

Regulations of Alcoholic Beverage Control Board. Section 44 (Order No. A-1, Aug. 30, 1940).

"Section 44. Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment, signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or other memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writ-

ing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

The general question involved here is the constitutionality of a Virginia Statute in so far that it sanctions certain regulations promulgated by the Virginia Alcoholic Beverage Control Board pursuant to the provisions thereof. These regulations govern and control all through interstate shipments of liquor and contain provisions for penalties for violation thereof.

The statute empowers the Board to promulgate regulations having the force and effect of law for the purpose of controlling the transportation of intoxicating liquor "within, into or through" Virginia. Pursuant thereto, the Board promulgated the regulations complained of in this case. We contend that these regulations, whether considered individually or collectively, are unconstitutional in that each or all of them violate the commerce clause of the Constitution of the United States, by regulating interstate commerce or placing an undue burden thereon.

In approaching this argument we think it proper to first review the authorities and ascertain the law as to the power of a state to regulate a shipment of whiskey originating elsewhere and merely passing through the state, destined to another state; and the limitations of such power, if any.

We shall treat the subject under two headings: first, with respect to the effect of congressional legislation and constitutional amendment thereon; and, second, the judicial definitions of the effect of the commerce clause of the constitution upon the power of states to regulate such interstate shipments.

FIRST.

The Effect of Congressional Enactment and Constitutional Amendment.

(a) The Wilson Act.

Prior to 1890 there seems to have been no congressional legislation on the subject, but in that year Congress enacted the Wilson Act, providing that liquor transported into a state should, upon arrival, be subject to the laws of such state as though produced therein, even though such liquor might be in its original package. (August 8, 1890, c. 728; 26 Stat. 313; 27 U. S. C. A. 121). This Act was not repealed by the Eighteenth Amendment or the National Prohibition Act and is still in force. *Premier-Pabst Sales Co.* v. *McNutt* (D. C. Ind., 1935) 17 Fed. Suppl. 708.

The primary object of this law was to attach the prohibitory laws of the states to liquors the moment they were delivered to the consignee therein, even though the liquors were contained in their original packages. The states could then forbid the sale of such liquors. This law created no new power in the state but placed imported liquors under the same laws as those of domestic origin. *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 17 S. Ct. 45, 49 L. Ed. 925; *Crescent Liquor Co.* v. *Platt* (C. C. W. Va. 1906) 148 F. 894; *Ex Parte Jervey* (C. C. S. C. 1895), 66 F. 957.

The Act created no new power in the State, and was not intended to and did not subject interstate shipments while in transit to state regulation or control. Shipments were not subject to the local law until they arrived at the point of destination and delivery was made to the consignee. *Crescent Liquor Co.* v. *Platt, supra; Rhodes* v. *Iowa*, 170 U. S. 412; 42 L. Ed. 1089; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572; *Pabst Brewing Co.* v. *Crenshaw, supra; Adams Express Co.* v. *Kentucky* (No. 1), 214 U. S. 218, 29 S. Ct. 633, 53 L. Ed. 972; *Rossi* v. *Pennsylvania*, 238 U. S. 62, 35 S. Ct. 677, 59 L. Ed. 1201.

(b) *The Webb-Kenyon Act.*

The Webb-Kenyon Act was enacted by Congress on March 1, 1913 (37 Stat. 699, 27 U. S. C. A. 122). It prohibited the transportation of liquor into a state when such liquor was to be used in violation of the laws of that state. This statute was re-enacted by the Act of August 27, 1935, c. 740 (49 Stat. 877) without any change in the language thereof.

The purpose of this Act as clearly appears from the hearing, debates and reports on the bill was to avoid the narrow construction placed upon the Wilson Law and to permit the local law to operate upon shipments of liquor brought into the State upon their arrival at the State line rather than after delivery to the consignee. (*49 Cong. Rec., Pts. 1, 3 and 5, passim, 62nd Cong., 3rd Sess., esp. Pt. 3 p. 2796 ff.; House Committee Report No. 1471, 62nd Cong., 3rd sess.*)

It deals wholly with importation and does not give states the right to enact legislation pertaining to exportation of liquors. *Ziffrin, Inc.* v. *Martin* (D. C. Ky. 1938) 24 F. Supp. 924; *Ziffrin, Inc.* v. *Reeves*, 1940, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128.

Reading the Act in the light thrown upon it by the Wilson Law and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Law; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws. *Clark Distilling Company* v. *Western Maryland Railway Company*, 242 U. S. 311; 61 L. Ed. 326.

"That the Act did not assume to deal with all interstate shipments of liquor is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the Act to develop." *Adams Express Co.* v. *Kentucky* (No. 2), 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267.

Since the Act specifies the character of the shipment designed to be taken from under the protection of the federal constitution, that is, liquors intended to be received, possessed, sold, or in any manner used in violation of any law of a state, it was manifestly not the intention of Congress to remove this protection from any other character of shipment. *Commonwealth* v. *White*, 166 Ky. 528, 179 S. W. 469; *Van Winkle* v. *State*, 4 *Boyce* 578, 91 Atl. 385; *Ex parte Peede*, 75 Tex. Cr. R. 247, 170 S. W. 749.

A state statute regulating interstate shipments of liquors that are not "intended by any person interested therein, to be received, possessed, sold, or in any manner used, * * * in violation of any law of such state" is therefore not authorized by the Act. *Commonwealth* v. *White, supra.*

The Supreme Court of Appeals of the Commonwealth of Virginia has heretofore given this construction to the Webb-Kenyon Act. In its opinion in the case of *Martin* v. *Commonwealth*, 126 Va. 715, 100 S. E. 836, the court says that neither the Wilson Act nor the Webb-Kenyon Act "contain any suggestion that a state law can operate upon intoxicating liquors as a subject of interstate commerce while being transported through such state."

Applying these constructions of this Act, while it may be true that the Act might apply to the shipment in question if and when it entered North Carolina, it could not be construed to authorize the Virginia Statute in question here.

(c) *The Reed Amendment.*

On March 3, 1917, Congress enacted what is known as the Reed Amendment (27 U. S. C. A. 123; 39 Stat. 1069, ch. 162; Comp. Stat. 1918, 8739A repealed June 25, 1936, ch. 815, Sec. 9, 49 Stat. 1930) prohibiting and imposing a penalty for transporting liquor in interstate commerce into a state which prohibits the manufacture or sale therein of intoxicating liquor for beverage purposes. This court construed this act to exclude liquor transported through

a state as a mere incident to transportation into another state. *United States* v. *Gudger*, 249 U. S. 373, 39 S. Ct. 323, 63 L. Ed. 653.

(*d*) *The Twenty-First Constitutional Amendment.*

The Twenty-First Amendment (U. S. C. A. Amend XXI, Sec. 2, p. 1038) provides:

> "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The history of this section of the Amendment clearly shows that its only purpose was to preserve to the states the same power given to them by Congress under the Webb-Kenyon Act. The dry states were fearful that Congress might, at some future time, repeal the Webb-Kenyon Act and they demanded that the protection afforded them by that Act be written into the fundamental law.

It simply confirmed the Webb-Kenyon Act, *Premier-Pabst Sales Corporation* v. *Grosscup*, D. C. Pa. 1935, 12 F. Supp. 970, affirmed 298 U. S. 226, 56 S. Ct. 754, 80 L. Ed. 1155, and its purpose was to make it impossible for Congress to permit the transportation or importation of intoxicating liquors into any State for use therein in violation of the laws of the state by a repeal of the Webb-Kenyon Act. *Joseph Triner Corporation* v. *Arundel*, D. C. Minn. 1935, 11 F. Supp. 145 reversed on other grounds 304 U. S. 401.

The language of section 2 so closely follows that of the Webb-Kenyon Act as to lead to the conclusion that it was copied therefrom and should receive the same construction. *Dugan* v. *Bridges*, D. C. N. H. 1936, 16 F. Supp. 694, appeal dismissed, 300 U. S. 684, 57 S. Ct. 668, 81 L. Ed. 887.

The words "transportation" and "importation" as used

in the Amendment are to be taken in their ordinary sense and are not to be given any technical meaning. "Importation" consists in bringing an article into a state from the outside. *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894. Such a construction gives to the Amendment the same effect had by the Webb-Kenyon Act, that is, to withdraw from the operation of the commerce clause intoxicating liquor when transported or imported "into" a state "for delivery or use therein * * * in violation of the laws thereof * * *" *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391; 59 S. Ct. 254, 83 L. Ed. 243. *Dunn* v *U. S.*, C. C. A. 10th Cir., 98 F. (2d) 119; *General Sales & Liquor Co. v. Becker*, D. C. Pa. 1936, 14 F. Supp. 348.

As was said by Mr. Chief Justice White, in the case of *United States* v. *Gudger*, supra, in construing similar language contained in the Reed Amendment:

> "Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any state or territory the laws of which state or territory prohibit the manufacture,' etc., includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning which would, however, be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into', as used in the statute, refers to the state of destination, and not to the means by which that end is reached, the movement through one state as a mere incident of transportation to the state into which it is shipped."

There is no substance in any contention that the Amendment gives to the states complete and exclusive control over commerce in intoxicating liquors. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 59 S. Ct. 804, 83 L. Ed. 1189.

Like the Webb-Kenyon Act the Amendment is not a penal provision and it is not self-executing. *Dunn* v. *U. S.*, supra.

Under both the Webb-Kenyon Act and the Twenty-first Amendment intoxicating liquor retains its status as a legitimate subject of interstate commerce until it is imported into a state in violation of a law of the state prohibiting or regulating its importation for use in the state. *Premier-Pabst Sales Corporation* v. *Grosscup*, supra. Its status is determined by two circumstances. First, there must be a law of the state prohibiting or regulating the importation. Second, the importation must be "into" the State "for delivery or use therein." Otherwise the shipment continues to be a legitimate subject of interstate commerce so far as to preclude any action by the state in reference thereto regardless of its possible status when introduced into other states during the course of the interstate transportation. In other words, its status during the course of a continuous transportation through a state is not affected by a status it may acquire in the future because of its introduction into another state in violation of laws of that state enacted under the authority of the Amendment.

The Amendment does not have the effect of reaching out throughout the whole of the United States so as to bring within its purview all liquors possessed anywhere in the United States by any person possessing the goods with an intention to introduce them into some one of the states in violation of its law. To be sure, persons and property may be subjected to the penalties of law where the property is possessed with an intention to devote it to an illegal use. See *Lilienthal* v. *U. S.*, 97 U. S. 237, 24 L. Ed. 901; *Goldsmith Grant Co.* v. *U. S.*, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376. But to construe the Twenty-First Amendment as having any such operative force is to extend its scope and to write therein words that it does not contain. *United States* v. *Gudger, supra.*

The Supreme Court of Appeals of Virginia has heretofore taken our view of the force and effect of the Amendment. In two opinions, *Williams* v. *Commonwealth*, 169 Va. 857, 192 S. E. 795 and *Surles* v. *Commonwealth*, 172 Va. 573, 200 S. E. 636, considered by the court in its opinion in *Dickerson* v. *Commonwealth*, 181 Va. 313, 24 S. E. (2) 550, to have been overruled by decisions of this Court, it was held that the Amendment does no more than withdraw the protection of the commerce clause from liquors imported into a state for delivery or use therein in violation of its law.

In his concurring opinion in the case of *Duckworth* v. *State of Arkansas*, 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294, Mr. Justice Jackson disagreed with the majority opinion, concurred in by all the remaining members of the court, saying that the constitutionality of the Arkansas Statute in question there should be sustained as being authorized by the Twenty-First Amendment.

It seems to be his opinion that the Twenty-First Amendment delegated to the states certain power to *control* through interstate shipments of liquor. We respectfully submit that the language of the Amendment permits of no such construction and that the authorities which we have cited are correct in their answer to this question. The majority opinion in the case announced by Mr. Chief Justice Stone was to the effect that the Amendment had no application, citing *U. S.* v. *Gudger*, *supra*.

From the foregoing considerations contained in this phase of the argument, our conclusion is that neither the several acts of Congress nor the Twenty-First Amendment have application to the case at bar, i. e., the transportation of whiskey through a state en route to its destination in another state and that this shipment of liquor may be regulated by the state through which it is being transported and restricted only in conformity with the commerce clause of the Constitution.

SECOND.

Judicial Definition of the Powers of the States Over Interstate Shipments of Intoxicating Liquors.

Undoubtedly alcoholic beverages are a proper subject of interstate commerce and state regulations which directly interfere with their transportation in interstate commerce (beyond that permitted by the Wilson Act, the Webb-Kenyon Act and the Twenty-First Amendment, all supra) are in contravention of the commerce clause of the Constitution of the United States, regardless of the desirability of the regulations from the standpoint of local interest. *Rossi* v. *Pennsylvania, supra, Kirmeyer* v. *Kansas,* 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721; *Leisy* v. *Hardin,* 135 U. S. 100, 34 L. Ed. 393; *Bowman* v. *Chicago & N. W. Ry. Co.,* 125 U. S. 465, 31 L. Ed. 700; *Louisville & Nashville Railroad Co.* v. *W. F. Cook Brewing Co.,* 223 U. S. 70, 36 L. Ed. 355; *Adams Express Co.* v. *Commonwealth of Kentucky* (No. 1), *supra.*

As was said by Mr. Justice White in the case of *Vance* v. *W. A. Vandercook & Co.,* 170 U. S. 438, 42 L. Ed. 1100:

> "Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

In the case of *Duckworth* v. *State of Arkansas, supra,* Mr. Chief Justice Stone had occasion to review the authorities and to define the extent to which a state might go in enacting regulations affecting interstate commerce, saying:

> "While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulat-

ing matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court; notwithstanding the commerce clause. See *California* v. *Thompson*, 313 U. S. 109, 113, 61 S. Ct. 930, 932, 85 L. Ed. 1219, et seq. and cases cited. See also cases collected in *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 39, 40, 47 S. Ct. 267, 270, 71 L. Ed. 524, and in *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188, Note 5, and 191, 58 S. Ct. 510, 515, 517, 82 L. Ed. 734.

"In the cases referred to the Court has sustained a variety of local regulations designed to safeguard the states from injurious local effects that may attend interstate transportation. Familiar examples are inspection and quarantine laws for the protection of local health and safety, applicable to persons, animals, and merchandise moving in interstate commerce. Again, a state may insure the safe and convenient use of its harbors and navigable waterways by controlling the movement of vessels in interstate and foreign commerce; in the interests of safety it may control the operations of interstate trains and of their employees and appliances.

"Of recent years the Court has sustained state regulations of the size and weight of motor cars moving interstate, designed to insure the safe and economical

use of the States' highways. *South Carolina Highway Dept.* v. *Barnwell Bros., supra*, and cases cited. A state may police "caravan" of motor vehicles moving over its highways in interstate commerce and charge a compensatory license fee for doing it. *Morf.* v. *Bingaman*, 298 U. S. 407, 56 S. Ct. 756, 80 L. Ed. 1245; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001. It may, in the interest of public safety and convenience, restrict particular types of motor vehicles moving in interstate commerce to particular areas. *Sproles* v. *Binford*, 286 U. S. 374, 393-395, 52 S. Ct. 581, 586-588, 76 L. Ed. 1167; cf. *Clark* v. *Paul Gray, Inc.*, *supra*, 306 U. S. 598, 59 S. Ct. 752, 753, 83 L. Ed. 1001. And a state may undertake to insure the fitness and integrity of those negotiating contracts for interstate transportation, by licensing them and requiring a bond to insure their good behavior. *California* v. *Thompson*, *supra*."

In the case of *California* v. *Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 the opinion was also written by Mr. Chief Justice Stone. This case, in effect, overruled the majority decision in the case of *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 525, and adopted the dissenting opinion of Mr. Justice Stone and Mr. Justice Brandeis. In the former case the court laid down the test to be applied as whether upon a "consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines."

A state may not, however, under the "cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." *Hannibal & St. J. Railroad Co.* v. *Husen*, 95 U. S. 465, 24 L. Ed. 527. It may not deny to motor vehicle carriers engaged exclusively in transporting liquors in interstate commerce through the state

the right to use its roads where the denial has no relation to public safety or the local public interest. *Buck* v. *Kuykendall*, 267 U. S. 307. 45 S. Ct. 324, 69 L. Ed. 623; *Bush & Sons Co.* v. *Malloy*, 267 U. S. 317, 45 S. Ct. 326, 69 L. Ed. 627; *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, 45 S. Ct. 191, 69 L. Ed., 445; *Bradley* v. *Public Utilities Commission of Ohio*, 289 U. S. 92, 53 S. Ct., 577, 77 L. Ed. 1053; *Liberty Highway Co.* v. *Michigan Public Utilities Commission*, D. C. Mich., 294 F. 703; *Red Ball Transit Co.* v. *Marshall*, D. C. Ohio, 8 F. (2d) 635.

From these authorities we conclude that the commerce clause does not preclude the several states from enacting and enforcing regulations governing through interstate transportation of intoxicating liquors, if such regulations are reasonably designed to safeguard the local public interests, and do not constitute an undue burden upon the commerce; but the state may not prohibit such transportation altogether nor regulate it in such a manner as to place an undue burden upon it.

In the case of *Johnson* v. *Yellow Cab Transit Co.*, 137 F. (2d), 274 U. S. Circuit Court of Appeals, Tenth Circuit, rendered July 26, 1943, Judge Phillips, in discussing the effect of the Twenty-first Amendment as well as the judicial definition of the regulatory powers of the states over through interstate transportation of liquor, used language which we deem to be most pertinent to the problem here when he said:

> "Oklahoma has power under the Twenty-first Amendment to forbid all importations of intoxicating liquor *into* the state or to adopt a lesser degree of regulation than total prohibition. It may also require a permit for the transportation of intoxicating liquor in interstate commerce through the state *as a means of establishing the identity of those who engage in such transportation and their routes and points of destination and of enabling local officers to take appropriate measures to insure transportation without diversion.*" (Citing Duckworth v. Arkansas, supra) (Italics supplied).

Again, in the same case, Judge Bratton in his concurring opinion says:

> "And it (the state) may impose reasonable regulations intended to safeguard the movement of such liquor in interstate commerce through the state, provided they do not constitute a substantial burden on such commerce. (Citing Duckworth v. Arkansas, supra) *But a state has no power to forbid the transportation in interstate commerce of intoxicating liquor through its territorial boundaries.* (Citing United States v. Gudger, and Williams v. Commonwealth, both supra). *And that is true even though the shipment is enroute to a destination where the manufacture and sale of such such liquor is prohibited by state law.* McCanless v. Graham, 177 Tenn. 57, 146 S. W. (2d) 137; Barnett v. State, 243 Ala. 410, 9 So. (2d) 267." (Italics supplied.)

As we have seen, liquor is a subject of lawful interstate commerce. Its transportation through a state involves no more local public concern or interest than such transportation of any other commodity, with the *sole exception* that the state is interested in preventing its diversion into channels within the state in violation of state laws. The state is not concerned with the shipment before it enters the state or after it leaves the state. Any regulations not reasonably designed to prevent such diversion into state channels would be violative of the commerce clause; and, even though the regulations might be so reasonably designed, yet if they materially interfered with or constituted an undue burden upon the free flow of such shipments they would still be violative of the commerce clause.

Applying these premises to the regulations in question here we shall discuss them under the various topics as hereinbefore indicated in order to ascertain whether or not they are violative of the commerce clause.

TOPIC I (Assignment of Error No. 2)

The Requirement That the Transporter Designate Upon the Bill of Lading the Route to be Traveled Through Virginia which Must be the Most Direct from the Consignor's Place of Business to the Place of Business of the Consignee. (Va. A. B. C. Board Reg. Sec. 44 (a) and (b).)

There is, of course, no objection to the requirement that a proper bill of lading accompany each shipment; and it may be that under the decision in the case of *Duckworth v. State of Arkansas*, supra, a requirement that the route to be traveled while in Virginia be specified would be valid and constitutional; but such is not the case here, for this regulation greatly increases the burden on the transporter by requiring him to specify a route which is the most direct from the place of business of the consignor to the place of business of the consignee.

In order to comply with this regulation the transporter must first ascertain the most direct route. He must avail himself of a road-map and sketch out roughly the most direct route from the consignor to the consignee. When only one state is to be traversed, this might not be such a serious problem. But, suppose that he must travel from Maine to Florida, or from New York to California. Unless the most direct route carried him through Virginia, he could not pass through any portion thereof, regardless of the desirability of such routing from an economic or any other standpoint. In addition, he could never be certain that the route chosen was the most direct.

Confining the problem to the instant case, the road-map would only designate the main highways, and what might on the map appear to be the most direct route, would not in fact be such. Virginia is interlaced with numerous hard-surfaced secondary highways, not shown on the road-maps, or on any others except certain local county maps.

The transporter would be forced to examine all available maps and other information and then he could never be absolutely certain that the route selected would be the most direct. There might well be some country dirt roads or lanes which would be more directly in line between the consignor and consignee. In 1939 the Supreme Court of Appeals of Virginia, in holding this regulation to be unconstitutional as violative of the commerce clause in the case of *Surles* v. *Commonwealth*, supra, said:

> "It may be true, and doubtless is that no great burden would have been imposed had these defendants been asked to indicate the route which they would take, but if some farmer in Maine wished to send a truckload of seed potatoes to California, and if Statutes like ours were everywhere in force, he would find it burdensome to work out in advance the route to be traveled; *indeed he might find it impossible.*" (Italics supplied).

The most direct route might be the most hazardous and costly. It is so often true, especially in Virginia, that the most direct route would involve climbing mountains and/or traveling over poorly constructed and maintained roads; while another somewhat longer route would take the transporter over smooth, flat highways, thereby involving a saving of time and manpower as well as of wear and tear on tires and machinery, and in the consumption of gasoline. Our transporter, however, would have no election but must choose the mountainous route.

Transporters carrying mixed cargoes are confronted with insurmountable difficulties. Suppose, in addition to a consignment of liquor, the carrier desires to transport other items to various points in Virginia as well as other States. He could not transport these other items unless the consignees were situated along the shortest route. In effect, this regulation would seem to prohibit the commercial carrier from transporting other commodities in the same vehicle with the consignment of liquor, and this

would greatly affect the profit and economy of the undertaking where a full load of liquor was not consigned.

It is not enough to say that the enforcement officers could accept reasonable excuses for violations or that they could administer the law in a reasonable manner. The Commonwealth under these regulations could exact heavy penalties for the smallest violations.

Not only are these requirements extremely burdensome to the transporter, but they are not reasonably designed to prevent the diversion of whiskey into channels within Virginia, or to prevent violations of its laws by the transporters while within the state. It may be that the designation of the route to be traveled would permit the state officers to ascertain whether there is likely to be a diversion of the cargo and to facilitate surveillance of the vehicle while in Virginia, but what purpose could the requirement that the route be the most direct serve?

The regulation is unreasonable in that it imposes a hardship on the transporter without serving any useful purpose. The decision in the *Duckworth* case, supra, affords the state ample power to police the shipment. Under that decision the state can require the shipper or the transporter to make the application for the permit upon the basis of a specified route to be traveled.

The regulation here is unnecessarily drastic in that it is too broad and seeks to deny interstate transporters the use of some of the roads of the state without any adequate reason based upon the necessity of the case from the standpoint of the protection of the public interest. In that respect it comes within the inhibition of the rule in *Hannibal & St. J. Railroad Company* v. *Husen* and *Buck* v. *Kuykendall*, *supra*.

Certainly this regulation cannot be brought within the language of Mr. Chief Justice Stone in the *Duckworth* case, *supra:*

> "It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the

states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state."

TOPIC II (Assignment of Errors Nos. 4 and 5)

The Requirement of a Bond Subject to Cancellation in the Discretion of the Virginia Alcoholic Beverage Control Board. (Va. A. B. C. Board Regulations, Section 42).

While neither the statute nor the regulations contain any express provision for the cancellation of any bond posted pursuant thereto, the Supreme Court of Appeals of Virginia in the instant case construed the statute and regulations to impliedly authorize the Board to cancel such bond in its discretion, saying:

> "The requirement for the posting of a bond is a regulation of a police nature. The Board having the authority to require the bond, under the police powers conferred upon it by the A. B. C. Act, had the right to cancel it with or without notice under the same power if, in the exercise of a reasonable discretion, it was satisfied that it was being used or about to be used against the public safety and welfare."

While we do not entirely agree with the Virginia Court in its construction of the law, it is an invariable rule that the Supreme Court of the United States will adopt and follow the State Courts of last resort in the construction of their own statutes. *Gatewood* v. *North Carolina*, 203 U. S. 531, 27 S. Ct. 167, 51 L. Ed. 305; *Fairfield* v. *County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544; *Polk* v. *Wendal*, 9 Cranch. 87; *Nesmith* v. *Shelbon*, 7 How. 812; *Walker* v. *Harbor Comr's*, 17 Wall. 648.

The authority of the Board to cancel the bond at will, in the exercise of its discretion, carries with it the power to deny to any one the right to transport liquor through Virginia for any reason.

The real effect of such a requirement is that the bond constitutes a license revocable on the part of the Board in its discretion.

The right of a citizen to carry on interstate commerce is not a franchise or privelege granted by the state but is a right conferred by the Constitution which every citizen of the United States is entitled to exercise under the laws of the United States. *Crutcher* v. *Kentucky,* 141 U. S. 47, 35 L. Ed. 649. A state law which denies such right, or substantially burdens or interferes with it is in conflict with the Constitution of the United States. *Vance* v. *W. A. Vandercook* (No. 1), *supra.*

This court has repeatedly declared that a state law is unconstitutional which requires a party to take out a license for the carrying on of interstate commerce, no matter how specious the pretext may be for imposing it. *Crutcher* v. *Kentucky, supra; Pickard* v. *Pullman Southern Car Co.,* 117 U. S. 34, 29 L. Ed. 785; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 30 L. Ed. 694; *Asher* v. *Texas,* 128 U. S. 129, 32 L. Ed. 368; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 32 L. Ed. 637; *McCall* v. *California,* 136 U. S. 104, 34 L. Ed. 391; *Norfolk & Western Railroad Co.* v. *Pennsylvania,* 136 U. S. 114, 34 L. Ed. 394.

Where a transportation of alcoholic beverages in interstate commerce has not been withdrawn from the operation of the commerce clause by the Webb-Kenyon Act and the Twenty-First Amendment this rule prevails and a state cannot make the right of the transporter to transport dependent upon the granting by it of a license.

A license is a permit to do business that cannot be done without it. It is synonymous with "authority" or "permission" and is essentially a grant to those to whom it is given or extended not enjoyed by persons generally. It is a grant by some competent authority to do an act which without such authority would be illegal. The object is to confer a right that does not exist without the license and a common right is not the creation of a license. Woolen & Thornton

on "The Law of Intoxicating Liquors", sec. 318 and cases cited. A license is not a privilege that any citizen may demand. It is in the nature of a favor. *Schweirman* v. *Highland Park*, Ky. 113 S. W. 507.

A license fee or tax is not a part of the license nor is it an inseparable incident thereof. Licenses may be and often are granted without exacting a fee or tax. *Youngblood* v. *Sexton*, 32 Mich. 402.

The very definition of a license makes clear the lack of power in a State to exact it as a condition precedent to the right to transport liquors through a state in interstate commerce. "A power to grant a privilege to one is inconsistent with the possession on the part of another of an absolute right to exercise such privilege." *People ex rel. Schwab* v. *Grant*, 126 N. Y. 473, 27 N. E. 964.

The right of a citizen of another state to transport goods in interstate commerce through the State cannot be held subject to the approval of the Virginia Alcoholic Beverage Control Board without admitting the power of that Board to control the exercise of the right. *Vance* v. *W. A. Vandercook* (No. 1), *supra*.

The name given to an exaction or the form it takes is immaterial and the court in determining its validity will look to its real substance and effect. *Lipke* v. *Lederer*, 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 39 L. Ed. 311.

In its essence the requirement that a person engaged in transporting alcoholic beverages through the state must first post a bond, subject to cancellation as we have seen, constitutes the imposition of a license as a condition precedent to the right to make the transportation. The requirement has all of the characteristics and the operative effect of a license. That this is necessarily so will be readily seen upon an examination of the regulations themselves and of the method and manner in which they were administered by the Board in this case.

The privilege of engaging in interstate commerce is one which the State cannot deny and the effect of the application of the discretion of the Board to the bond requirement is not only to burden interstate commerce but to obstruct it. *Buck* v. *Kuykendall, supra, Bush & Sons Co.* v. *Malloy, supra; Sprout* v. *South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833.

The Supreme Court of Appeals of Virginia has heretofore passed upon this regulation and declared it invalid. In the case of *Williams* v. *Commonwealth, supra*, reaffirming the principles enunciated in *Martin* v. *Commonwealth, supra*, it was held that the provisions of the statute and regulations here in issue when applied to interstate shipments of liquor, not to be delivered or used in Virginia but only passing through the state, were a direct burden on interstate commerce and in contravention of the commerce clause.

In its decision in the instant case the court has overruled its former decision and justifies the imposition on the ground that it "is a regulation of a police nature." But a statute of a state which imposes a direct burden on interstate commerce is not saved by calling it an exercise of the police power. *Charleston & Western Carolina Railway Company* v. *Varnville Furniture Co.*, 237 U. S. 597, 37 S. Ct. 715, 59 L. Ed. 1137; *D. E. Foote & Company, Inc.* v. *Stanley*, 232 U. S. 494, 59 L. Ed. 698.

A State may not interfere with transportation through the State "beyond what is absolutely necessary for its self-protection. It may not under cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce." *Hannibal & St. J. Railroad Company* v. *Husen, supra.*

The error of the Virginia Court appears to be in its assumption that *Ziffrin* v. *Reeves, supra*, and *Duckworth* v. *Arkansas, supra*, govern the case.

The *Ziffrin* v. *Reeves* decision has no applicability whatever to the issues presented here. That decision was predicated upon the right of a state under its plenary police power reserved to it by the Tenth Amendment to control the alcoholic beverage traffic within its territory. The State had the power to regulate her internal affairs notwithstanding an incidental burden on interstate commerce when such regulation was "an inseparable incident of the exercise of legislative authority, which, under the Constitution has been left to the states." This rule was first stated by the Supreme Court in 1852 in the leading case of *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, and has been reaffirmed and restated many times in the intervening years. See *Pervear* v. *Commonwealth*, 5 Wall. 475; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. Ed. 819.

The Virginia Court says that the decision in the *Duckworth* case authorized a state to require a permit for the transportation of liquor in interstate commerce through the state and that evidence of the posting of the bond with the Board constituted a permit. The court is under considerable misapprehension as to the kind and nature of the permit which the Supreme Court countenanced. In the *Duckworth* case this court specifically limited its ruling to a permit which was obtainable upon application and for a nominal fee and where any failure of the issuing officer to act promptly was controllable by mandamus. The exaction was supported because the court found that it did not forbid or preclude the transportation, or materially interfere with the free flow of commerce among the states beyond what was reasonably necessary to protect the local interests. In this respect the court simply applied and followed its previous ruling in *Buck* v. *Kuykendall*, *supra*.

The imposition here is not in the nature of the permit authorized to be exacted by the court in the *Duckworth* case but has all of the characteristics of a type of license which has uniformly been condemned by the court. It would give to the states the power, to control interstate transportation

of liquor, through the exercise of its discretion by an administrative board.

But, says the Virginia Court in this case:

> "It is not to be presumed that the authority of the Board will be arbitrarily used; but in the event that it is abused, a person feeling himself aggrieved may seek judicial relief in the courts." (R. 42)

In other words, the Board will not cancel the bond unless it feels that the transporter is a type of person who might divert the liquor into state channels. The Board may be led to this conclusion by rumors (such as existed in this case) or through any information it may receive no matter how unreliable and regardless of the source. It might well be that a transporter's creed or color would have a pronounced influence upon its decision.

In the opinion of the Virginia court, a person whose bond was thus arbitrarily cancelled could seek "judicial relief in the courts."

The Court probably considered the opinion in the *Duckworth case, supra,* to support such a position, where this court used the following language:

> "It also said that any failure by the state commissioner to act reasonably and promptly in administering the law would be controlled by the courts through mandamus. In a later case, Hardin, Commissioner v. Spiers, 152 S. E. 2d 1010, arising under regulations not in force at the time of appellant's conviction, the same court declared that the commissioner must exercise this power in a reasonable, not an arbitrary manner."

In the *Duckworth* case, *supra*, the transporter was "entitled to a permit on application", and the permit requirement there was in its nature an "inspection measure". The right to mandamus the Commissioner arose when he failed to issue the permit with reasonable promptness. There was no discretionary *right to refuse* to issue the permit. The

situation here is far different. After the bond had been cancelled the transporter would have no right to seek any relief whether judicial or otherwise. He would certainly have no right to mandamus by any court in Virginia directed to the correction of an abuse of the power of the Board, which the Supreme Court of Appeals of Virginia has held in this case to be discretionary. Without exception the Supreme Court of Appeals of Virginia has held that mandamus will apply only to the performance of ministerial duties, and never to question the exercise of a discretionary power. *Ford* v. *Cox*, 165 Va. 239; *Wilder* v. *Kelley*, 88 Va. 274, 13 S. E. 483; *Richmond* v. *Epes*, 98 Va. 233, 35 S. E. 723.

The transporter would have no right to an appeal to any court, because there is none provided under the statute law of Virginia. The action of the Board would be final in every sense of the word, and the effect would be a complete prohibition against the transportation of any liquor through Virginia by the transporter, until or unless the Board chose to rescind its action.

We submit that the regulation in question here is a device which enables the Board to determine who may transport liquor through Virginia; that this power is in effect a licensing power; and that, as we have seen, such regulation is in contravention of the commerce clause of the Constitution.

TOPIC III. (Assignment of Error No. 3)

The Requirement that the Consignee Have a Legal Right to Receive the Shipment at Its Destination.

(Va. A. B. C. Board Regulation, Section 44 (c)).

It is to be noted that violation of this regulation requires no knowledge on the part of the transporter that the consignee has no legal right to receive the shipment. The appellants here are not charged with such knowledge, nor

does the stipulation of facts set forth that they had such knowledge. So far as this case is concerned the appellants are entirely innocent of any intention to violate any law of North Carolina.

However, under the regulation in question, if, for any reason, the consignee has no legal right to receive the shipment the transporter is guilty of a violation. The consignee must have complied with all federal, state, county and municipal laws and regulations affecting his right to receive the shipment. If he has not complied to the letter with all such laws and regulations, even though the transporter has no knowledge thereof, the latter violates the challenged regulation as soon as he enters Virginia.

In order to be certain that he is complying with this Virginia regulation the transporter must familiarize himself with all pertinent federal, state, and local laws and regulations. He must also construe such laws and regulations as they may be applied to the consignee. He must ascertain that the consignee has complied with all licensing requirements. And, even after he has made such an investigation, he must risk the chance that his constructions of the laws and regulations as applied to the consignee are correct. In fact, in this case, he must risk the chance that the Virginia court will not construe the North Carolina law according to his own construction thereof. It may well be that there would be jury issue as to the legal right of the consignee to receive the shipment.

A situation may well exist where the right of the consignee to receive the shipment might change while the goods are in transit. For example, the consignee's license might expire or the laws might change due to legislative enactments or judicial construction.

In short, even though the transporter has borne the heavy burden of investigating the law governing the right of the consignee to receive the shipment, he can never be reasonably certain that he is not violating the Virginia law while transporting the shipment through Virginia.

Of course, if the transporter's vehicle contains various shipments consigned to several consignees, his problem is multiplied by the number of such consignees.

While it is admitted in this case that the consignor had the legal right to make the shipment, it is interesting to note that under the regulation the transporter is confronted with much the same problems with respect to the legal right of the consignor to make the shipment.

Under the limits of the purpose of state regulations of interstate transportation set forth in the *Duckworth* and other cases cited, *supra*, we can conceive of no purpose or design for this regulation other than to prevent persons who may intend to violate the laws of other states from transporting liquors through Virginia, under the theory that persons who are so vile and reprehensible as to violate, *or to contemplate violation of*, the laws of other states are not proper persons to transport liquor through Virginia, in that they might divert the liquor into channels in Virginia in violation of the State laws.

The purpose of this regulation appears to be somewhat similar to that of the bond requirements (discussed under Topic II) that is, to prevent certain types of persons from transporting liquor through Virginia. However, as we have seen, the State has no power to determine who may or may not engage in through interstate transportation of liquor. The licensing power of the State does not extend to through interstate commerce, and, regardless of how praiseworthy the motive, the state may not destroy the right to engage in interstate transportation, nor regulate it more than is reasonably necessary to protect the local public interest.

The next question is whether or not the regulation is reasonably designed to effect the end sought. The hardship is not upon the consignee but upon the transporter, who, as we have seen, is an innocent party. While some transporters who are *in particeps criminis* with the consignee would be precluded, the regulation would affect all trans-

porters, regardless of their knowledge of or intended participation in the violation of the laws of the state to which the liquor might be consigned. The regulation, is, therefore, not reasonably designed to prevent the unlawful distribution or use of the liquor in Virginia.

Upon these considerations we submit that this regulation does not meet the test laid down in the case of *California* v. *Thompson, supra*. Upon a consideration of the facts and circumstances, the character of the business and the actual effect upon the flow of commerce, we are led to the conclusion that the regulation does "infringe the national interest in maintaining the freedom of commerce across state lines".

TOPIC IV. (Assignment of Error No. 6.)

The Cumulative Effect of the Virginia Regulations.

Assuming each of the regulations heretofore discussed to be in itself a valid exercise of the power of the state to enact and enforce regulations affecting interstate commerce, within the limits prescribed by the opinions in the case of *California v. Thompson* and *Duckworth* v. *State of Arkansas*, both *supra*, can it be said that their cumulative effect does not constitute an undue burden upon interstate commerce? Can the state, under the guise of enacting regulations reasonably designed to promote the local public interest, multiply its "reasonable regulations" to the extent that they actually prohibit or substantially interfere with interstate commerce?

In order to obey the regulations in question here the transporter must meet all requirements thereof.

He must post a bond in the penalty of $1,000.00 with approved surety, which bond is subject to cancellation in the discretion of the Board. Evidence that the bond has been posted must accompany each shipment.

He must specify the route to be travelled through Virginia which must be the most direct from the consignor to the consignee. He must not vary from the route specified.

This requirement would of course, apply even though it might be desired to transport in one cargo various shipments of liquor from several consignors to several consignees, all of whom may be situated in various places.

Although such matters are usually of no concern to the transporter, he must ascertain whether or not the various consignors have the legal right to make the shipment and whether or not the various consignees have the legal right to receive the same.

It can readily be seen that these requirements, taken as a whole, have the effect of excluding and prohibiting a substantial portion of through interstate transportation of liquor. From an economic standpoint alone, obedience to the regulations would necessitate the expenditure of time and money on the part of the transporter and thus add to the cost of transportation, even if he were willing to risk the hazard that his conclusion that the consignor and consignee have the legal rights to ship and receive the consignments is correct. This, we submit constitutes an interference with the free flow of transportation of liquor through Virginia, which as we have seen is violative of the commerce clause of the constitution.

As was said by Mr. Justice Jackson in his concurring opinion in the *Duckworth* case, *supra:*

> "Our danger, as the forefathers well knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations. Each may serve some local purpose worthy enough by itself. Congress may very properly take into consideration local policies and dangers when it exercises its power under the commerce clause. But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national society. It is the movement and exchange of goods that sustain living standards, both of him who produces and of him who consumes. This vital national interest in free commerce among the states must not be jeopardized."

The Right of Appellants to Raise the Constitutional Questions.

Mr. Justice Jackson in the *Duckworth* case, *supra,* based his concurring opinion partially upon the ground that since Duckworth admitted that his cargo of liquor was to be sold in violation of the laws of Mississippi, he had no right to question the constitutionality of the Arkansas regulation because one who "assails the constitutionality of a statute must stand on his own right to relief." The purpose of *Duckworth's* trip being to violate the constitution (Amendment XXI) and the laws of Mississippi, he did not come within the class of those who may invoke the constitutional protection.

Applying these observations to this case, the contention would be that, even though the questioned regulations might be unconstitutional as to other transporters of liquor through Virginia, the appellants may not raise the question because after their transportation is complete the liquor transported will fall into hands not entitled to receive it under the laws of North Carolina.

There can be no doubt that one who invokes the protection of the commerce clause must place himself within the class of those whose rights are affected by the challenged state statute. This rule is supported by the authorities cited in the footnotes to Mr. Justice Jackson's opinion, *supra,* as well as others too numerous to mention. *People of State of N. Y. ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 27 S. Ct. 188, 51 L. Ed. 415; *Harneford* v. *Silas Mason Co.,* 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814; *Premier-Pabst Sales Co.* v. *Grosscup, supra.*

We think that Mr. Justice Holmes' opinion in the case of *Hatch* v. *Reardon, supra,* correctly states the law. That case involved the constitutionality of a New York stamp tax on the sales of securities. Reardon sought an injunction against the enforcement of the law on the ground (among others) that it violated the commerce clause. The stock sale involved in the case was purely an intra-state

transaction, but Reardon contended that the well established rule of *U. S.* v. *Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040, enabled him to challenge the constitutionality of the New York statute regardless of whether his particular transaction was in interstate commerce, because the statute might be construed to cover interstate as well as intra-state commerce.

The rule announced in the *Ju Toy* case, *supra*, was that a statute must be valid "as to all that it embraces or altogether void."

Mr. Justice Holmes in the case of *Hatch* v. *Reardon*, *supra*, says that the Ju Toy rule is still the law:

> "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the *tax* laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced the law is incorrect, it is void as to all."

Applying this rule to the instant case; if the appellants had been engaged in *intra-state commerce* they would not be permitted to urge the unconstitutionality of the challenged regulations as affecting *interstate* commerce. However, once they are placed within the category of interstate commerce, they are entitled to attack the regulations *as to all that they embrace*. If the regulations are unconstitutional as to any members of the class of interstate transporters they are invalid as to all. *U. S.* v. *Ju Toy, supra.*

Mr. Justice Jackson seemed to be of the opinion that since Duckworth intended to violate the laws of Mississippi and the Twenty-First Amendment he was not a member of the class entitled to raise any constitutional question.

We do not concede that appellants intended to violate the Twenty-First Amendment or any law of North Carolina, but, assuming that they did, we have seen that the Twenty-First Amendment is not a penal statute nor is it self-executory. It is incapable of violation in itself, and simply enables the states to protect themselves from shipments into their own borders in violation of their laws.

Suppose, however, that the appellants intended to violate the Amendment and the laws of North Carolina, we can find no authority for the proposition that such fact would preclude them from invoking the protection of the commerce clause. In fact the case of *McFarland* v. *American Sugar Refg. Co.*, 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899, cited by Mr. Chief Justice Stone in the majority opinion in the *Duckworth* case, *supra*, supports a contrary view. In the former case Mr. Justice Holmes says:

> "We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprived it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way."

As this proposition was restated by Mr. Chief Justice Stone in the *Duckworth* case, *supra*,

> "We may also assume that appellants' admission (that the liquor was intended for illegal use in Mississippi) no more deprives him of the right to invoke the protection of the commerce clause against the Arkansas Statute than did intended violation by the importer of the liquor laws of the state of destination before the adoption of the Webb-Kenyon Act. * * * and the Twenty-First Amendment."

We, therefore, submit that the appellants have the right to raise the question of the constitutionality of the challenged Virginia regulations in this case.

CONCLUSION.

Prior to the decisions in the cases of *Ziffrin* v. *Reeves* and *Duckworth* v. *Arkansas*, both *supra*, the Supreme Court of Appeals of Virginia was of the opinion that the questioned regulations were violative of the commerce clause. *Surles* v. *Commonwealth* and *Williams* v. *Commonwealth*, both *supra*. The only reasons for that court's reversal of its former opinion were the opinions of this court in the *Ziffrin and Duckworth* cases. In the case of *Dickerson* v. *Commonwealth*, *supra*, involving essentially the same problems as those of the instant case and decided the same day, the court (referring to the *Ziffrin* and *Duckworth* cases) says:

> "We are bound by the judicial construction placed upon the provisions of the Constitution by the Supreme Court of the United States."

The Virginia Court gave weighty consideration to the language of the *Ziffrin* case where this court said:

> "Without doubt a state may *absolutely prohibit* the manufacture of intoxicants, their *transportation*, sale, or possession, irrespective of when or where produced or *obtained*, or the use to which they are to be put." (Italics supplied.)

The Virginia court seemed to believe that this language referred to through interstate transportation such as exists in the instant case. We submit that this language in the *Ziffrin* case should be construed in the light of its facts, and that it was intended to apply only to shipments of liquor originating in Kentucky destined to another state in interstate commerce, and not to through interstate shipments such as the one under consideration here.

The Virginia court also seemed to be of the opinion that the *Duckworth* decision empowered the state to enact any regulation so long as it "does not interfere with *lawful* interstate transportation." (Italics supplied.) We take it that the court means that any regulation is valid if the ship-

ment is involved in any infraction of the law outside Virginia, and, that, if such is the case, Virginia can regulate in any manner that she sees fit. For the reasons stated, we submit that this is not the law.

The Virginia Court in the instant case has extended the rule of the *Duckworth* case far beyond our conception of the intention of this court as expressed in that opinion. The bond with its cancellation feature is far more than an "inspection measure" or a "means of establishing the identity of those who are to engage in the transportation." The most direct route requirement is more than a means of establishing the "route and destination" of the shipment. The unlawful consignee feature is without any parallel in the *Duckworth* case, or any other authority. In short, the regulations are not reasonably designed to insure that the liquor "is transported without diversion, and "precludes" or "interferes with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state."

Respectfully submitted,

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